

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CYTOLOGIX CORPORATION,

Plaintiff,

v.

VENTANA MEDICAL SYSTEMS, INC.,

Defendant.

Civil Action No. 04-11783 (RWZ)

CYTOLOGIX CORPORATION'S MEMORANDUM IN SUPPORT OF MOTION TO
AMEND THE COMPLAINT

I. INTRODUCTION

CytoLogix Corporation ("CytoLogix") moves, pursuant to Fed.R.Civ.P. 15(a), for leave to amend its complaint to add a count of infringement of U.S. Patent No. 6,783,733 B2 ("the '733 patent") by defendant Ventana Medical Systems, Inc. ("Ventana"). Because Ventana has not taken much discovery at this stage, including no depositions by Ventana to date, and because CytoLogix seeks leave to amend its complaint within the timeframe set by the Court after the December 1, 2005 status conference, CytoLogix should be permitted to amend its complaint.

II. ARGUMENT

A. Leave to Amend Is Freely Given

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). This rule reflects an underlying policy that disputes should be determined on their merits, and not on the technicalities of pleading rules. *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Absent a clear basis such as futility, undue delay and undue prejudice, Rule 15(a) generally requires allowance of amendments. *Id.* at 182; *Vargas v. McNamara*, 608 F.2d 15, 18 (1st Cir. 1979).

B. Leave to Amend Should Be Allowed Because Ventana Will Suffer No Undue Prejudice and Leave Is Being Sought by CytoLogix on a Timely Basis

As a result of fact discovery to date, CytoLogix believes that Ventana's BenchMark® XT slide preparation system infringes not only the patent set forth in its original complaint, U.S. Patent No. 6,541,261 B1, but also the '733 patent. For this reason, CytoLogix seeks leave to amend the complaint to add the '733 patent to the case.

Ventana has not engaged in extensive discovery at this stage. In fact, Ventana has yet to even take any depositions. Thus, Ventana cannot seriously claim that it would be prejudiced by adding a count asserting infringement of the '733 patent to this action.

Additionally, CytoLogix's motion to amend the complaint is timely filed. According to the Court's December 1, 2005 order after the status conference, the deadline for amending pleadings is December 28, 2005. This motion to amend is being filed prior to that date. In short, given the lack of undue prejudice to Ventana and CytoLogix's lack of delay in seeking leave to amend, the amendment of the complaint should be allowed.

III. CONCLUSION

For the above reasons, CytoLogix respectfully requests that its motion for leave to amend the complaint be granted.

FISH & RICHARDSON P.C.

Date: December 28, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of December, 2005, a true and correct copy of the foregoing CYTOLOGIX CORPORATION'S MEMORANDUM IN SUPPORT OF MOTION TO AMEND THE COMPLAINT was caused to be served on the attorney at the following address as indicated:

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